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No. 96-466

In the

Supreme Court of the United States

October Term, 1996

KATHY STUPAK-THRALL; and MICHAEL A. GAJEWSKI, Major (Retired/Disability) United States Army, and BODIL GAJEWSKI, husband and wife,
Petitioners,

v.

UNITED STATES OF AMERICA and DANIEL R. GLICKMAN, Secretary of Agriculture, individually and in his official capacity
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF GOVERNOR JOHN ENGLER OF THE STATE OF MICHIGAN SUPPORTING THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the United States Forest Service may, without the state's consent, exercise the sovereign authority of the State of Michigan to extinguish property rights of Michigan citizens where Congress has made the Forest Service's regulatory power "subject to valid existing rights."

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INTEREST OF AMICUS CURIAE

Pursuant to Rule 37.2, John Engler, Governor of the State of Michigan, respectfully submits this brief amicus curiae in support of the Petition for Writ of Certiorari. Written permission was granted by all parties and lodged with the Clerk of this Court.

Governor Engler has been Governor of the State of Michigan since 1991. During his tenure as Governor, he has been a leader in seeking to restore the proper constitutional balance of power between Michigan and the federal government. Governor Engler has continuously fought over-regulation by the federal government and, more particularly, federal regulation in matters historically and constitutionally left to the states. The questions presented in this case turn on this precise issue. Here, a federal agency is acting outside the scope of its Congressionally delegated authority and is altering state-defined private property rights.

Governor Engler has a direct interest in how private property rights are regulated in his state. This year Governor Engler signed into law a bill requiring all state departments and agencies to consider private property owners' rights when making any regulatory decision.

The lower court decision at issue in the petition is an affront to the principles of federalism and to the protection of private property rights which Governor Engler has fought to protect over the past six years. The importance of this case cannot be overstated for Governor Engler and for the Michigan residents who live adjacent to the more than 3.5 million acres of federally owned land within the State of Michigan.

STATEMENT OF THE FACTS

Petitioners Kathy Stupak-Thrall and Michael and Bodil Gajewski[1] are owners of riparian [2]properties along Crooked Lake in the State of Michigan. *Stupak-Thrall v. United States*, 89 F.3d 1269, 1274 (1996), Boggs, J. dissenting. As riparian owners, Michigan law entitles petitioners to use Crooked Lake for many purposes, including recreational uses such as boating and fishing. The majority of the land abutting Crooked Lake is owned by the federal government and is administered by the United States Forest Service. At issue in this case is the Forest Service's unauthorized abridgement of petitioners' riparian rights. *Id.*

The federal property is part of the Sylvania Wilderness Area, created in 1987 under the Michigan Wilderness Act (the Act), Pub. L. 100-184, 101 Stat. 1274 (1987) (MWA). *Id.* The Forest Service manages the Sylvania Wilderness Area pursuant to the authority granted under Section 5 of the Act, which states, "*Subject to valid existing rights*, each wilderness area designated by this Act shall be administered by the Secretary of Agriculture." MWA, at 1275-76 (emphasis added).

Notwithstanding the Act's protections for "valid existing rights," in 1992, the Forest Service promulgated a regulation, Amendment No. 1, which prohibits the use of "sail-powered watercraft, watercraft designed for or used as floating living quarters and the use of nonburnable disposable food and beverage containers" on Crooked Lake. *Id.* at 1275. It also discourages "the use of electronic fish-finders, boom-boxes,

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[1] For simplicity, this brief refers to all petitioners as petitioners or Stupak-Thrall.

[2] Though "littoral" would be more accurate, "riparian" will be used to maintain consistency with the lower court opinions.

and other mechanical or battery operated devices." *Stupak-Thrall v. United States*, 843 F. Supp. at 328.

Amendment No. 1 applies to that portion of Crooked Lake surrounded by the Sylvania Wilderness. The only portion of the lake to which Amendment No. 1 does not apply is the small bay upon which Michigan citizens, including petitioners, own property. *Stupak-Thrall*, 70 F.3d at 890. However, Michigan law unequivocally holds that all riparian owners are entitled to use the *entire surface* of the lake which their land abuts, subject only to limitation under the "reasonable use" doctrine, *Burt v. Munger*, 314 Mich. 659, 23 N.W.2d 117, 119 (1946), and the navigational servitude retained in trust by the State of Michigan for the benefit of the public, *Peterman v. State Department of Natural Resources*, 446 Mich. 177, 521 N.W.2d 499, 508 (1994). Governor Engler submits that Amendment No. 1 unlawfully infringes upon petitioners' riparian property rights, and is an unlawful usurpation of Michigan's legitimate police power authority to regulate private land use and to determine the health, safety, and welfare interests of Michigan citizens.

STATEMENT OF THE CASE

A. Administrative Decision

When Amendment No. 1 was adopted, Kathy Stupak-Thrall appealed the adoption of the regulation to the Regional Forester. *Stupak-Thrall*, 843 F. Supp. at 329. The Regional Forester affirmed the decision to adopt the regulation, and, on appeal, the administrative decision was affirmed by the Chief Forester. *Id.* The Forest Service claimed that the phrase "subject to valid existing rights" "refers only to subsurface mineral rights in the Nordhouse Dunes area and does not include riparian rights." *Id.*

B. District Court Decision

Kathy Stupak-Thrall then filed suit in the United States District Court for the Western District of Michigan.[3] *Stupak-Thrall*, 70 F.3d at 884. She claimed that the language "subject to valid existing rights" in the Act protects her Michigan-created riparian rights from being abridged by the Forest Service in the management of the Sylvania Wilderness Area. *Stupak-Thrall*, 843 F. Supp. at 328-29. Alternatively, she argued that Amendment No. 1 was beyond Forest Service authority because the Property Clause of the United States Constitution[4] did not grant the federal government the power to regulate private property. *Id.* at 331. She also asserted a claim that she was entitled to just compensation for the taking of her property in violation of the Fifth Amendment to the United States Constitution if the regulation were in fact a valid exercise of Forest Service authority.[5] *Id.* at 328. Under

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[3] The Gajewskis also filed suit in federal District Court. The suits were consolidated for trial. *Stupak-Thrall*, 70 F.3d at 884.

[4] Article IV, Section 3, Clause 2, provides:

> The Congress shall have the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

[5] The relevant portion of the Fifth Amendment provides: "[N]or shall private property be taken for public use without just compensation."

Michigan law, "riparian rights are property."[6] *Hilt v. Weber*, 252 Mich. 188, 233 N.W. 159, 168 (1930).

The District Court upheld Amendment No. 1, but flatly rejected the Forest Service's self-serving interpretation of Section 5 of the Act, stating, "[t]he Forest Service's construction of the statute is not a permissible construction. The 'valid existing rights' clause in the MWA is a simple, straightforward savings clause that is not limited to a particular kind of right." *Stupak-Thrall*, 843 F. Supp. at 330. It further held that "MWA should be read to make administration of the Sylvania Wilderness subject to plaintiffs' valid riparian rights, as established under state law." *Id.*

The District Court unfortunately did not end its analysis there. In disregard of Kathy Stupak-Thrall's "valid existing rights," it held that Amendment No. 1 was consistent with the Forest Service's' Congressional mandate under the Act because it was "within the power of Congress under the Property Clause to set aside federal land as wilderness and to protect, preserve and, if necessary, restore the wilderness quality of that land by regulating private as well as federal property on lakes within a wilderness area." *Id.* at 332.

Further, it determined that the exercise of Stupak-Thrall's riparian rights on Crooked Lake was subject to restriction under Michigan's "reasonable use" doctrine. *Id.*

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[6] In addition, because riparian rights are property, Michigan law may require just compensation if those rights are "taken." *Hilt*, 233 N.W. at 168. An exception to the compensation requirement is if the government use resulting in the taking or destruction of riparian rights "has a real and substantial relation to a paramount trust purpose." *Id.* Riparian rights are also subject to Michigan's "reasonable use" doctrine. *Rice v. Naimish*, 8 Mich. App. 698, 155 N.W.2d 370, 372 (1967).

Michigan's reasonable use doctrine allows one riparian owner to challenge the land use activities of another riparian owner as unreasonable, and entitles the disputing owners to a court determination of whether or not the disputed activities are reasonable. *Stupak-Thrall*, 70 F.3d at 889. The District Court mistakenly concluded that "[t]he restrictions in Amendment No. 1 are consistent with valid existing rights because they are permissible under the 'reasonable use' doctrine." *Stupak-Thrall*, 843 F. Supp. at 333.

C. Initial Sixth Circuit Decision

Stupak-Thrall appealed the District Court decision to the Sixth Circuit Court of Appeals. *Stupak-Thrall*, 70 F. 3d at 884. The three-judge panel (Sixth Circuit panel or panel) rejected the District Court's application of the "reasonable use" doctrine, finding it "inapplicable when one riparian owner unilaterally decides to ban certain uses of others, whether or not the uses themselves are unreasonable." *Id.* at 889. However, it affirmed the lower court's grant of summary judgment to the government.

First, the panel found that the Property Clause gave *Congress* the power to regulate "*purely private* property, in order to ensure adequate protection of the federal interest." *Id.* at 885 (emphasis in original). Second, it found that the authority delegated by Congress to the Forest Service under the Wilderness Act of 1964, 16 U.S.C. § 1131, *et seq.*, "is coextensive with Congress's own authority under the Property Clause." *Id.* at 888. The panel then considered what, if any, limitation was imposed on Forest Service authority by the phrase "subject to valid existing rights" in the Act. *Id.*

The panel conceded it had to look at existing state law to determine the scope of existing rights. *Id.* at 889. Though it recognized the lower court's mistake and rejected the "reasonable use" doctrine as a basis of decision, it nevertheless

held that the doctrine was instructive "because it shows that the riparian rights of private citizens are not absolute under Michigan law." *Id.* Based on this vague premise, the panel found that, because "'the general government has a power over its own property analogous to the police power of the several states,'" *id.* at 889, quoting *Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976), a Forest Service regulation "does not violate Congress' express limitation deferring to 'existing' state law rights in the wilderness acts, so long as it does not exceed the bounds of permissible police power regulation under state law," *id.* at 890. Therefore, because the court believed that *State of Michigan* could regulate the petitioners' riparian uses of Crooked Lake, the Forest Service could do the same.

D. Final En Banc Decision

Dissatisfied with the panel's decision, Stupak-Thrall petitioned for a rehearing en banc. The Sixth Circuit granted the rehearing, and vacated the panel's decision. *Stupak-Thrall v. United States*, 81 F.3d 651 (1996). However, the en banc court was unable to reach a consensus on the law, and split evenly -- seven to seven. Consequently, the District Court decision was affirmed. Judge Moore, who authored the panel decision, wrote a minority concurrence (concurrence) incorporating the decision of the Sixth Circuit panel, *Stupak-Thrall v. United States*, 89 F.3d 1269, 1270 (1996). Judge Boggs authored a vigorous dissent, arguing that Stupak-Thrall's riparian rights as recognized under Michigan law were protected from abridgement by Congress' use of the language "subject to valid existing rights" in the Michigan Wilderness Act. *Id.* at 1305.

SUMMARY OF ARGUMENT

This Court should grant the Petition for Writ of Certiorari to resolve the important question of what Congress meant by the phrase "subject to valid existing rights" in the Michigan Wilderness Act. The resolution of this question goes far beyond the parties affected, since numerous other federal enactments have used identical language in the establishment of national parks, national recreation areas, and other designations of public and private property for the preservation of lands possessing historical, ecological, recreational, and aesthetic values. The State of Michigan, alone, contains over 3.5 million acres of federal property within state boundaries, amounting to roughly 10% of the state's area. This case will determine the nature and amount of authority delegated to federal agencies in the management of millions of acres of state and private property adjacent to federal lands when such authority is circumscribed by the language "subject to valid existing rights." The inability of a 14-judge en banc panel of the Sixth Circuit to reach a decision on the meaning of this statutory language in the Michigan Wilderness Act clearly illustrates the need for this Court to resolve the issue.

There is a present and direct conflict between the decision in this case and another federal circuit in the statutory interpretation of the phrase "subject to valid existing rights." Though no other Courts of Appeals have construed the Michigan Wilderness Act, the Ninth Circuit has recognized that when federal law delegates authority "subject to valid existing rights," a federal agency lacks the authority to abridge state or federally created rights that predate the enactment being construed. *Schultz v. Department of Army, United States*, 10 F.2d 649, 660 (9th Cir. 1993). In addition, the decision of the court below is directly contrary to precedent of this Court

in *Great Northern Railway Company v. Steinke*, 26 U.S. 119 (1923).

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

ARGUMENT

I

THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO RESOLVE AN IMPORTANT QUESTION OF FEDERAL STATUTORY AND CONSTITUTIONAL LAW ON THE DIVISION OF AUTHORITY BETWEEN THE FEDERAL AND STATE GOVERNMENTS

A. This Court Should Grant the Petition for Writ of Certiorari to Resolve an Issue of Statutory Interpretation That Has Impacts Reaching Far Beyond the Parties to This Case

In the Michigan Wilderness Act, Congress specifically provided that the Forest Service was to administer the wilderness area created in the State of Michigan "subject to valid existing rights." MWA, Section 5, 101 Stat. at 1275. However, the Forest Service disregarded this directive by redefining Michigan state law, and gutting the petitioners' established riparian property rights. This action sets a dangerous precedent that should be addressed by this Court.

The lands designated pursuant to the Michigan Wilderness Act as wilderness comprise over 91,000 acres of property within the State of Michigan. MWA, Sec. 3, 101 Stat. at 1274-75. However, this case has significance far beyond the

Michigan Wilderness Act and the boundaries of the State of Michigan. Identical language respecting "valid existing rights" has been used in numerous other pieces of legislation, affecting millions of acres of state and private property and potentially millions of private citizens who own land adjacent to federal property.[7] By upholding Amendment No. 1 and refusing to

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[7] The phrase "subject to valid existing rights" may be found throughout Title 16 of the United States Code. For example, the phrase is used in 16 U.S.C. § 80a, establishing Kings Canyon National Park; 16 U.S.C. § 90, establishing North Cascades National Park; 16 U.S.C. § 110c, establishing Mount Rainier National Park; 16 U.S.C. § 111c, establishing Mesa Verde National Park; 16 U.S.C. § 123, establishing Crater Lake National Park; 16 U.S.C. § 271, establishing Canyonlands National Park; 16 U.S.C. § 272, establishing Arches National Park; 16 U.S.C. § 273, establishing Capitol Reef National Park; 16 U.S.C. § 398c, establishing Virgin Islands National Park; 16 U.S.C. § 403-3, establishing Smoky Mountains National Park; 16 U.S.C. § 406d-1, establishing Grand Teton National Park; *etc.* In addition, the phrase is employed in the establishment of National and International Monuments and Memorials (*see*, 16 U.S.C.§ 431, *et seq.*); National Recreation Areas, such as 16 U.S.C. § 460q, establishing Whiskeytown-Shasta-Trinity National Recreation Area; 16 U.S.C. § 460v, establishing Flaming Gorge National Recreation Area; 16 U.S.C. § 460y-5, establishing King Range National Recreation Area; and 16 U.S.C. § 460z, establishing Oregon Dunes National Recreation Area; *etc.* It also is used in the establishment of National Forests (*see*, 16 U.S.C. § 482b, *et seq.*); Scenic Research Areas (*see,* 16 U.S.C. § 541, *et seq.*); and in the establishment of Game and Bird Preserves (*see* 16 U.S.C. § 695p). In addition, the phrase is used in numerous enactments of Congress relating to land and land interest conveyances of the federal government (*see*, *e.g.*, 16 U.S.C.

(continued...)

recognize the riparian rights of landowners along Michigan's Crooked Lake who, under Michigan state law, "have the right *to make reasonable use of the entire surface of the lake*," *Stupak-Thrall*, 843 F. Supp. at 328 (citing *Hall v. Wantz*, 336 Mich. 112, 57 N.W.2d 462, 464 (1953)) and *Burt*, 23 N.W.2d at 119 (emphasis added), the decision below nullifies specific statutory language in the Michigan Wilderness Act intended to preserve these state-created rights. This decision will encourage federal agencies to circumvent clear congressional mandates to defer to "valid existing rights" and will promote the infringement of state protected property rights in the management of federal lands.

The Forest Service's enactment of Amendment No. 1 overturns a state recognized private property interest and reverses a state policy of encouraging broadly authorized use of public trust waters. The federal courts should not countenance such intrusive administrative action that unsettles established principles of state law absent a clear and unequivocal authorization by Congress. The authority delegated in the Michigan Wilderness Act lacks any indication that Congress intended to empower the Forest Service to modify state law and policy on the use of public trust waters. To the contrary, the language "subject to valid existing rights" clearly indicates congressional intent that the Forest Service must respect state law and policy. Amendment No. 1 is an

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[7](...continued)
§ 3144, relating to Federal North Slope Lands Studies and Oil and Gas Leasing Program and Mineral Assessment), including interests held or conveyed between the federal government and Native Americans (*see, e.g.*, 25 U.S.C. § 566d, which specifically lists liens, taxes and mortgages as some of the "rights" to which any land transfer is subject; and 43 U.S.C. § 1601, *et seq.*, the Alaska Native Claims Settlement Act). The listing here is by no means exhaustive.

unnecessary and illegal abrogation of the petitioners' existing property rights, and an unwarranted attempt to exercise the sovereign power of the State of Michigan to define and regulate the uses of private property. This Court should grant the Petition for Writ of Certiorari to address these important questions of statutory and constitutional law.

B. Where Congress Delegates Authority to a Federal Agency "Subject to Valid Existing Rights," the Agency May Not Invoke the Property Clause to Grant Itself Unlimited Regulatory Authority Over Private Property

Stupak-Thrall argued that, even pursuant to the Property Clause, the federal government lacks the power to regulate purely private property. In rejecting this argument, the District Court relied on *Kleppe v. New Mexico*, 426 U.S. 529, for the proposition that, where the federal government is acting to protect a federal interest in land, the federal government's authority under the Property Clause "is broad enough to reach beyond territorial limits" of the federal land. *Stupak-Thrall*, 843 F. Supp. at 332 (quoting *Kleppe*, 426 U.S. at 538-39). Based on this broad dicta, the Court then presumed that, because the restrictions in Amendment No. 1 promoted the federal interest in preserving the wilderness character of the Sylvania Wilderness Area, the regulation was therefore consistent with the Property Clause. *Stupak-Thrall*, 843 F. Supp. at 332. Nonetheless, the District Court did not declare that the Forest Service's powers under the Act were coextensive with *Congress*' power under the Property Clause.

On appeal, the Sixth Circuit panel accepted the District Court's pronouncements about Property Clause powers and took them a step further. Confronting the question of what limitation was imposed by the phrase "subject to valid existing rights," the panel held that, under *Kleppe*, "the general government doubtless has a power over its own property

analogous to the police power of the several states, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case." *Stupak-Thrall*, 70 F.3d at 889 (quoting *Kleppe*, 426 U.S. at 540). Notwithstanding the questionable validity of this dicta, the panel then made the unsupported assertion that the "Property Clause's police power," *id.* at 890, could be exercised in any manner "so long as it does not exceed the bounds of permissible police power regulation under state law."[8] *Id.* Consequently, the panel concluded that, since the *State of Michigan*, pursuant to its police powers, could have imposed reasonable regulations upon riparian uses to promote the health, safety and welfare interests of Michigan citizens, the Forest Service could regulate such uses, as well, to serve federal interests. This conclusion is insupportable. Whether the State of Michigan could have extinguished its citizens' riparian rights without paying compensation is not at all clear on this record. Even if the state possessed such power, however, it has not agreed to share or cede that sovereign power to the Forest Service.

The State of Michigan explicitly reserves to riparian owners the right to use the entire surface of lake waters, *Burt*, 23 N.W.2d at 119, for virtually any use, from swimming, bathing and wading to fishing, sailing, boating, waterskiing, sledding, and ice-skating. *Stupak-Thrall*, 89 F.3d at 1285 (citations omitted). State law provides only minimal limitations on these rights. In short, the right to engage in riparian uses are

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[8] "Police powers" are generally defined as the authority of the state to enact laws and regulations for the health, safety and welfare interests of its citizens. *See, e.g., Penn Central Transportation Authority v. City of New York*, 438 U.S. 104, 145 (1978). The federal government does not possess general police powers with respect to its citizens. *United States v. Lopez*, 514 U.S. ___, 115 S. Ct. 1624, 1633 (1995).

not only recognized, but *legally protected* by the State of Michigan under its legitimate police power authority to determine what laws and regulations will best benefit the state and its people. The usurpation by a federal agency of Michigan's authority to determine for Michigan citizens through democratic means the health, safety and welfare interests of those citizens is unprecedented and should not stand.

The federal government does not have a general police power authority beyond its own lands, *see Lopez*, 514 U.S. ____, 115 S. Ct. at 1633, and *Kleppe*, 426 U.S. at 540, nor can it assume such a power by arrogating to itself the police power of a state. With respect to Crooked Lake, the government has no more rights than other riparian owners. It cannot abrogate the rights of other riparian owners -- rights protected by both the language of the Act and the established law of the State of Michigan. This Court should grant the Petition for Writ of Certiorari to clarify that, whatever the limits of federal power to manage federal lands under the Property Clause, the federal government does not possess police power authority over state citizens in the use of private property where Congress delegates regulatory authority "subject to valid existing rights."

II

THE DISTRICT COURT DECISION AFFIRMED BY AN EQUALLY DIVIDED EN BANC PANEL OF THE SIXTH CIRCUIT, IS IN DIRECT CONFLICT WITH THE NINTH CIRCUIT AS TO THE MEANING OF THE PHRASE "SUBJECT TO VALID EXISTING RIGHTS"

The Sixth Circuit's affirmance of the district court decision creates a direct conflict with a ruling of the Ninth Circuit. The en banc concurring opinion of the Sixth Circuit was in error when it stated:

> All authorities are in agreement that the "subject to valid existing rights" language is essentially designed to restrain agencies from effecting a taking. . . . [It] appears to be Congress's "promise" to private property owners that, at a minimum, it will not take their property, even *with* just compensation.

Stupak-Thrall, 89 F.3d at 1270 (emphasis in original). To the contrary, the Ninth Circuit Court of Appeals is not "in agreement" with the concurrence. Instead, the Ninth Circuit, like the dissent, construes the words "subject to valid existing rights" as "protect[ing] from invasion or disparagement (1) property rights (2) officially sanctioned by state law (3) in existence on the date the [Act in question] was enacted." *Id.*, 89 F.3d at 1288.

In *Schultz v. Department of Army, United States*, *supra*, the Ninth Circuit found that the phrase "subject to valid existing rights" prohibited the federal government from impairing the plaintiff's pre-existing right of access across federal property. Notably, in direct contradiction of the Sixth Circuit's construction of the phrase, the issue of a "taking" was neither raised by the parties nor the court. Nonetheless, the court in *Schultz* plainly held that the "rights" protected were rights as defined under existing *state or federal law*.

Schultz involved the establishment of a United States Army base, Fort Wainwright, near Fairbanks Alaska, in which each transfer of land included the term "subject to valid existing rights." The Ninth Circuit stated that, in order for Schultz to establish his pre-existing right to cross the base to reach his property, "[a]ll he was obliged to show was that the homesteaders to the east of Fairbanks *used as a matter of right* some road, trail or footpath to cross the land before it was acquired by the Army." *Id.* at 660. The Ninth Circuit found

that "[a] homesteaders' access trail--their right of way--was in existence within the meaning of Alaska law before the army took possession of the base," and reversed the decision of the lower court. *Id.* at 662. Contrary to the claim of the concurrence in this case that the "authorities" agree with its interpretation, it is clear that the Ninth Circuit has construed the phrase "subject to valid existing rights" as requiring federal government to recognize all rights valid under state law, regardless of whether a "taking" is alleged.

In the Ninth Circuit, under *Schultz*, property owners are assured of having their long-held state rights protected from *any* federal encroachment where Congress has delegated federal authority "subject to valid existing rights." In contrast, the Sixth Circuit's inability to resolve the meaning of that phrase leaves property owners in the State of Michigan without such assurances. Instead, the District Court decision invites federal agencies to test the limits of their new-found police powers" in prescribing for Michigan citizens the uses to which their private property may be put. This Court should grant the Petition for Writ of Certiorari to resolve the present and direct conflict between the Ninth and Sixth Circuits.

III

THE DECISION OF THE DISTRICT COURT IS INCONSISTENT WITH PRECEDENT OF THIS COURT

In 1923, this Court construed the term "subject to all valid existing rights" in a land grant map approved by the Secretary of the Interior in *Great Northern Ry. Company v. Steinke*, *supra*. In *Steinke*, this Court recognized that the purpose of those words

> was not to show that any of the land designated on the map was excluded from the grant, but to direct attention to *what under the act would be*

> *true without them--namely, that the grant was to be effective as against the United States, but was not to impair valid existing claims of settlers or others, and that to make the grant effective against such claimants their rights should be extinguished through private negotiations or, if need be, through condemnation proceedings.*

Steinke, 261 U.S. at 126 (emphasis added). In other words, under *Steinke*, the term "subject to all valid existing rights" preserves intact any and all pre-existing rights and claims of private individuals as though the government's action had not taken place. This Court recognized no exception for competing government interests.

Notwithstanding *Steinke*, the District Court found that the interests of the federal government in preserving the wilderness character of the federal lands surrounding Crooked Lake outweighed the "slight restriction" on the riparian "rights and interests" of Michigan citizens owning private land along Crooked Lake. *Stupak-Thrall*, 843 F. Supp. at 334. Putting aside the fact that the restrictions imposed upon the petitioners' use of over 90% of Crooked Lake is not "slight" but substantial, this weighing of interests was clearly not consistent with the view in *Steinke* that "valid existing rights" preserve pre-existing rights intact. The District Court decision is in conflict with this Court's opinion in *Steinke*.

Steinke suggests that legislation employing the term "subject to valid existing rights" means that, unless otherwise defined, *any* rights pre-dating the legislative enactment in question not only survive, but are superior to, any delegation of authority contained in the enactment. Adherence to this principle is the only just way to insure that the rights of private citizens will be protected, and that the federal government will

not encroach on the powers reserved to the states in the governance of state citizens and state lands.

The courts below overlooked *Steinke* in interpreting the relevant language in the Michigan Wilderness Act. Instead, they created a new interpretation of the language "subject to valid existing rights" that conflicts with *Steinke* on the two most critical points. First, *Steinke* says the language preserves all valid rights recognized under state law while the courts below say the language preserves only those rights the loss of which would constitute a taking under the Fifth Amendment. Second, *Steinke* says the rights preserved by the language may be "extinguished ... through condemnation proceedings." *Steinke*, 261 U.S. at 126. While the courts below, attempting to find some meaning left in the words of Congress, say the language prohibits the loss of rights protected by the Fifth Amendment "even *with* compensation." Stupak-Thrall, 89 F.3d at 1270 (emphasis in original).

This Court should grant the Petition for Writ of Certiorari to establish conclusively that the Congressional mandate to manage federal lands "subject to valid existing rights" prohibits federal agencies from impairing state created rights that predate the federal enactment being applied.

CONCLUSION

In the Michigan Wilderness Act, Congress delegated to the Forest Service authority to manage federal wilderness areas in the State of Michigan "subject to valid existing rights." The Sixth Circuit, sitting en banc, was unable to resolve whether this delegation prevented the Forest Service from diminishing the riparian rights petitioners have always enjoyed under Michigan law. Consequently, a decision of the District Court, with which no member of the Sixth Circuit agrees, now allows

the Forest Service to exercise the sovereign power of the State of Michigan without the state's consent and without a clear statement from Congress delegating such power. This result is unprecedented and insupportable. The Forest Service has been allowed to extinguish the private property rights of Michigan citizens that have long been recognized and protected by the State of Michigan. Further, the Sixth Circuit impasse allows federal agencies to usurp Michigan's authority by determining, in the absence of a democratic process, the health, safety, and welfare interests of Michigan citizens.

For the foregoing reasons, amicus Governor Engler of the State of Michigan respectfully requests that this Court grant the Petition for Writ of Certiorari.

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Respectfully submitted,

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